(3)

No. 87-1869

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARCTIC SLOPE REGIONAL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CATHERINE C. COOK
General Counsel
JEROME M. FEIT
Solicitor
HANFORD O'HARA
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether the court of appeals properly determined that the Federal Energy Regulatory Commission had acted within its lawful authority in approving as uncontested a settlement of a rate investigation endorsed by all parties except petitioner, where petitioner retained the right to challenge, at a future date, the rates charged under the settlement agreement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1869

ARCTIC SLOPE REGIONAL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 832 F.2d 158. The order of the Federal Energy Regulatory Commission approving the final settlement (Pet. App. 22a-44a), its order approving the initial settlement (Pet. App. 54a-64a), and its order denying rehearing (Pet. App. 50a-53a) are reported respectively at 35 F.E.R.C. (CCH) ¶ 61,425 (1986), 33 F.E.R.C. (CCH) ¶ 61,064 (1985), and 33 F.E.R.C. (CCH) ¶ 61,392 (1985).

JURISDICTION

The judgment of the court of appeals (Pet. App. 76a-78a) was entered on October 27, 1987. The petition for rehearing and suggestion for rehearing en banc were denied on January 15, 1988 (Pet. App. 79a-80a). On April 4, 1988, the Chief Justice extended the time for filing a

petition for a writ of certiorari to and including May 14, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to orders issued by the Federal Energy Regulatory Commission (Commission or FERC) approving settlement agreements between the State of Alaska and the owners of the Trans Alaska Pipeline System (TAPS)[1] that resolve extended administrative litigation challenging rates for the transportation of oil through the pipeline.

1. After the discovery of oil reserves on the North Slope of Alaska in 1969, various oil companies constructed an 800-mile pipeline from the North Slope to the all-weather port of Valdez on the Pacific coast of Alaska. As the pipeline was nearing completion in 1977, the TAPS owners filed tariffs with the Interstate Commerce Commission (ICC).[2] The filed tariffs contained rates for transportation of oil over the 800-mile system ranging from $6.04 to $6.44 per barrel. The State of Alaska, the United States Department of Justice, the ICC's Bureau of Investigations and Enforcement, and petitioner Arctic

---

[1] At the time of the settlements, the TAPS owners were Arco Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, Union Alaska Pipeline Company, Sohio Alaska Pipe Line Company, and Amerada Hess Pipeline Corporation. See Pet. App. 2a n.1.

[2] Before October 1, 1977, oil pipelines were subject to the jurisdiction of the ICC. On that date, jurisdiction was tranferred from the ICC to FERC. See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 634 n.4 (1978) (*TAPS I*).

Slope Regional Corporation (Arctic) immediately filed protests against the tariffs. Pet. App. 2a-3a.[3]

Under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7),[4] the ICC suspended the tariffs for the maximum seven months and launched an investigation.[5] The case was ultimately assigned to administrative law judges (ALJs) for hearings of different phases of the matter, a format that FERC retained when it assumed jurisdiction in October 1977. The so-called Phase I proceeding involved the tariffs' ratemaking methodology, including rate base and rate of return; the Phase II proceeding concerned the reasonableness of the TAPS construction costs. Pet. App. 3a-4a.

On February 1, 1980, after lengthy proceedings held over a 13-month period in 1978 and 1979, the ALJ presiding over Phase I issued an initial decision establishing a ratemaking methodology and recommending interim rates substantially below the tariffs filed by the TAPS owners. See 10 F.E.R.C. (CCH) ¶ 63,026 (1980). While this decision was pending before it, the Commission decided *Williams Pipe Line Co.*, 21 F.E.R.C. (CCH) ¶ 61,260 (1982), which addressed the issue of oil pipeline

---

[3] The Court is familiar with this early history of the TAPS litigation. See *TAPS I, supra.*

[4] In October 1978 the Interstate Commerce Act was recodified at 49 U.S.C. 10101 *et seq.* Oil pipelines, however, continue to be regulated under the original Act (49 U.S.C. (1976 ed.) 1 *et seq.*). Unless otherwise specified, citations to the Act refer to the 1976 version. See Pet. App. 4a n.3; Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337.

[5] The ICC permitted the TAPS owners to file lower interim rates that would remain in effect during the suspension period. This Court upheld the ICC's authority to suspend a pipeline's initial tariff and to set maximum interim rates during the suspension period. *TAPS I*, 436 U.S. at 651-654.

ratemaking methodology. The Commission accordingly remanded the Phase I decision to the ALJ for reconsideration in light of *Williams Pipe Line.* Before the ALJ had an opportunity to conduct remand proceedings, however, the court of appeals reversed *Williams Pipe Line. Farmers Union Central Exchange, Inc.* v. *FERC,* 734 F.2d 1486 (D.C. Cir.), cert. denied, 469 U.S. 1034 (1984). The ALJ then suspended the Phase I remand proceedings.

In the meantime, the Phase II proceedings were going forward. The presiding ALJs held hearings between February 1982 and December 1984, and set a briefing schedule that would end in January 1986. The ALJs suspended the Phase II proceedings, however, in October 1985, because of a proposed settlement between the State of Alaska and six of the TAPS owners. See Pet. App. 4a.

2. Given the likelihood that the TAPS litigation would continue for a substantial period of time, Alaska and two of the TAPS owners, Arco Pipe Line Company and BP Pipelines Inc., began settlement negotiations. "From this beginning, Alaska and six of the eight [TAPS] owners managed to reach settlement by July 1985" (Pet. App. 4a). By this time, the Antitrust Division of the United States Department of Justice had announced its support of the settlement agreements subject to certain conditions, as had the Commission's staff. See *id.* at 6a, 55a, 71a-72a.[6] Petitioner, and two TAPS owners, Sohio Alaska Pipe Line Company and Amerada Hess Pipeline Corporation, continued to oppose the settlement. See *id.* at 66a, 71a.

The settlement agreement submitted to the presiding ALJs on June 28, 1985, had two major components. First,

---

[6] The Department of Justice signed the "Stipulation and Offer of Settlement" that led to the settlement subject to the Commission's approval (J.A. 1108; "J.A." refers to the joint appendix filed in the court of appeals). The Department of Justice did not sign the separate settlement agreements (J.A. 502; see also Pet. App. 65a-66a).

the settling TAPS owners agreed to pay refunds for the rates charged during the period 1982 to 1985. Second, the agreement established a "rate-setting methodology (the TAPS Settlement Methodology or TSM) until the year 2011, the estimated remaining useful life of the pipeline" (Pet. App. 4a). Under the TSM (*id.* at 5a (footnote omitted)),

> rates are set on an annual basis, and are regarded under the regulatory scheme as any other rate filings by a common carrier. Thus, any such rates are subject to challenge by non-settling parties, such as Arctic * * *. [T]he financial impact of [the TSM] is two-fold: (1) to "front-end load" the tariffs charged by the owners in the early, pre-settlement years of the pipeline and (2) to provide for diminishing rates beginning with the initial rates filed under the settlement in December 1985.

See also *id.* at 66a-67a.[7]

3. a. In an order issued October 23, 1985 (Pet. App. 54a-64a), the Commission "approve[d] the settlement agreement with respect to the settling parties because it is fair and reasonable and in the public interest" (*id.* at 60a).[8] The Commission stated that such settlements "are to be

---

[7] The presiding ALJs acknowledged (Pet. App. 66a) that the TSM has two principal consequences. First, it diminishes considerably the signatory carriers' potential obligation to pay refunds to shippers whose oil has been transported through the System during the early years of its operation. Second, it provides for relatively low transportation rates in future years, when decisions about the development *vel non* of marginal oil reserves in northern Alaska will be made.

[8] The Commission cited *United Municipal Distributors Group* v. *FERC*, 732 F.2d 202 (D.C. Cir. 1984), as authority for its procedure of severing the contesting parties and approving the settlement with respect to the consenting parties. See Pet. App. 55a n.3.

encouraged [because they] are in the interests of this Commission, the regulated companies, their customers, other parties such as [the State of] Alaska and [the Department of] Justice, and the public * * *" (*ibid.*). The Commission, however, acknowledged the "concerns of the nonsettling parties" and thus remanded the proceedings to the presiding ALJs "to allow the nonsettling parties a hearing only on those issues which apply to them" (*ibid.* (footnote omitted)). The Commission did not address the nonsettling parties' objections because the Commission was not "imposing the terms of the Settlement Agreement on any nonsettling party" (*id.* at 60a n.17).[9]

In an order issued December 19, 1985 (Pet. App. 50a-53a), the Commission denied Arctic's request for rehearing. The Commission rejected petitioner's argument that the procedure adopted by the October 23, 1985, order violated the Commission's own rules and due process. The Commission reiterated that its "rules permit the severing and approval of uncontested portions of a settlement and the setting of contested portions of the case for hearing"[10] and referred to the "case law uphold[ing] this position" (Pet. App. 52a (footnote omitted); see note 8, *supra*). Petitioner also argued that the remand denied non-settling parties an independent determination of reasonable rates. In rejecting this argument, the Commission made clear

---

[9] The Commission also approved provisions of the settlement agreement concerning the allocation of certain costs among the TAPS owners as a pooling agreement under Section 5(1) of the Interstate Commerce Act, 49 U.S.C. 5(1). See Pet. App. 60a-61a.

[10] The Commission relied on Rule 602(h)(1)(iii), 18 C.F.R. 385.602(h)(1)(iii), which provides:

> If contested issues are severable, the uncontested portions may be severed and decided in accordance with paragraph (g) of this section.

that petitioner would be "afforded an opportunity to raise its issues at a hearing" (Pet. App. 52a).[11]

On February 5, 1986, while the case was on remand before the presiding ALJs, Sohio Alaska Pipe Line Company and Amerada Hess Pipeline Corporation agreed to join in the settlement agreement. Accordingly, on March 12, 1986, the State of Alaska proposed that these two TAPS owners be added to the settlement agreement; the Commission's staff and the Department of Justice supported this proposal. After all parties filed comments and replies, the ALJs, on April 15, 1986, certified the settlement agreement to the Commission. Pet. App. 7a, 24a.

b. On June 27, 1986, the Commission issued its "Order Approving Settlement, Granting Application, Affirming Initial Decision, and Terminating Dockets" (Pet. App. 22a). The Commission severed petitioner from the proceeding under the Commission's Rule 602(h)(1)(iii)[12], and approved the settlement as uncontested under Rule 602(g).[13] The Commission rejected petitioner's

---

[11] Arctic petitioned the court of appeals for review of the Commission's December 19, 1985, order denying rehearing. The TAPS owners, as intervenors, moved to dismiss on the ground that petitioner lacked standing to contest the settlement. A motions panel of the court of appeals denied the motion to dismiss on July 14, 1986, concluding that petitioner's contentions "present the requisite injury to make petitioner an aggrieved party" (Pet. App. 21a).

[12] See note 10, *supra*.

[13] Rule 602(g)(3), 18 C.F.R. 385.602(g)(3), provides:

> An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

The Commission also approved the addition of Sohio and Amerada Hess to the settlement agreement and to the pooling arrangement under 49 U.S.C. 5(1). See Pet. App. 43a.

argument that the Commission may not lawfully dismiss its protest. The Commission stated (Pet. App. 37a (footnote omitted; brackets and emphasis in original)):

> At present, Arctic neither ships oil through TAPS nor does it have a royalty interest in any oil being shipped via TAPS. It has no direct interest in TAPS' rates. Arctic informs us that it has interests in probable and possible [oil] reserves on the Alaskan North Slope * * * and the oil in which it has a royalty interest will be shipped over TAPS soon. At best, the record indicates this shipment *may* occur in the early to mid-1990's. This contingent, potential future interest is not so present and immediate to justify allowing Arctic to raise this proceeding to the level of a contested settlement.

The Commission made clear that it was not "impos[ing] the settlement on Arctic nor is Arctic bound by [the Commission's] approval of the settlement" (Pet. App. 40a-41a). Moreover, in reiterating the substance of its earlier orders, the Commission emphasized that "[i]f, and when Arctic is actually aggrieved, it may contest TAPS' rates * * * by filing a complaint or protest to a rate filing" (*id.* at 41a (footnote omitted); see *id.* at 26a n.17).

4. The court of appeals (Pet. App. 1a-19a) denied Arctic's petitions for review of the Commission's action, concluding that the Commission had acted within "lawful bounds" (*id.* at 2a) and in furtherance of "substantial public-interest considerations" (*id.* at 10a-11a), by "approving a settlement as in the public interest, while ensuring that Arctic can avail itself of its future remedies when its interest is more fully developed" (*id.* at 19a (footnote omitted)).[14]

---

[14] In the court of appeals, the United States, as a statutory respondent to the petition for review under 28 U.S.C. 2344 and 2348, neither

The court of appeals first rejected petitioner's claim that the Commission approved the settlement in violation of its own rules governing such settlements. The court stated that "this dispute is entirely about a FERC-approved settlement," and that the Commission's actions were within the broad terms of the agency's "quite generous and flexible" settlement rules (Pet. App. 11a). The court thus concluded that those rules, as confirmed by *United Municipal Distributors Group* v. *FERC*, 732 F.2d 202 (D.C. Cir. 1984) (*United*), permitted the Commission "to sever a contesting party from the proceedings and to treat the matter as uncontested, so long as a forum was provided to resolve the dissenter's challenge" (Pet. App. 11a).

The court of appeals further rebuffed petitioner's contention that the Interstate Commerce Act itself required the Commission "to assure just and reasonable rates" in this proceeding (Pet. App. 11a (footnote omitted)). Noting that Sections 15(7) and 15(1) of the Act, 49 U.S.C. 15(7) and 15(1), "confer broad discretion upon the Commission to structure its proceedings as it sees fit" (Pet. App. 12a), the court concluded that "decisions under the [Act] not to pursue an investigation once begun lie squarely within the agency's discretion * * *" (*id.* at 13a).[15] Moreover, the court held (*id.* at 14a) that

> [t]his congressionally granted, judicially confirmed discretion [under the Act], coupled with the general policy favoring settlement of administrative proceedings, * * * lead[s] us to the conclusion that

---

supported nor opposed the Commission's order under review. See Position of the United States, No. 86-1115.

[15] The court referred to decisions such as *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979) (initiation of Section 15 investigations), and *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289 (1975) (suspension of challenged rates).

> neither the statute nor the agency's corpus of rules requires the Commission under any and all circumstances to prescribe just and reasonable rates whenever a party requests that it do so, even after administrative proceedings have been underway for some considerable time.

Finally, the court of appeals, in upholding the Commission's severing of petitioner from the proceeding, found that petitioner was "for starters, not even a current rate payer [and thus] [i]ts interest is * * * considerably less immediate than that of the ratepayer in *United*" (Pet. App. 16a). And, although concluding that petitioner's allegations of present injury meet "jurisdictional" standing requirements (*id.* at 10a n.10), the court also recognized "Arctic's currently less direct interest in rates than it may well have at some later time" (*id.* at 18a n.21). The court thus held that "it [was] appropriate for the Commission, under the specific circumstances at hand, to serve [Arctic's] interests by not forcing the settlement upon Arctic and by preserving possible future challenges for a riper moment" (*id.* at 17a (footnote omitted)).

ARGUMENT

In upholding the Commission's order in this case, the court of appeals left standing as "fair and reasonable [a] settlement as to all those who have the most direct and immediate interest in these long-lived proceedings" (Pet. App. 17a). This settlement, as the court of appeals acknowledged (*id.* at 18a-19a), established a predictable and declining ceiling for TAPS oil rates for a substantial period of time and also resolved long years of dispute over refunds for the period before the rates went into effect. Moreover, the court approved, "under the specific circumstances at hand," the Commission's conclusion that

Arctic, as the only party opposing settlement, has the right to challenge the settlement but that such challenge should be brought at "a riper moment," namely, when Arctic's interests became more direct and definite (*id.* at 17a).

The court of appeals' decision, which reflects a careful balance of competing interests, is correct and does not conflict with any decision of this Court of any other court of appeals. Moreover, although the settlement agreement is economically significant and beneficial to the public interest, the agreement itself is unique and its approval is therefore not likely to be of any continuing legal importance. Indeed, as the court of appeals pointed out, "[t]he very uniqueness of the proceeding and the subsequent settlement render[ed] the Commission's action more readily understandable and defensible" (Pet. App. 16a). For all these reasons, further review by this Court is not warranted.

1. Petitioner contends (Pet. 15-17) that the court of appeals violated the rule of *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), in approving the Commission's action on a basis that the Commission itself had rejected. In petitioner's view, the Commission "had dismissed Arctic from the proceeding for lack of standing" (Pet. 16); the court of appeals rejected that "ruling" and "upheld the agency's order as a proper exercise of administrative 'discretion' " (*ibid.*). This contention, however, misperceives the rulings of both the court of appeals and the Commission and provides no basis for disturbing the decision below.

The Commission, adhering to a ruling in another proceeding,[16] concluded that a party may not "automatically create a genuine, material issue [of fact] in a settlement

---

[16] See *El Paso Natural Gas Co.*, 25 F.E.R.C. (CCH) ¶ 61,292 (1983); Pet. App. 36a n.39.

merely by its opposition to the settlement" (Pet. App. 36a). Instead, when all other parties accept a settlement, the non-settling party's interests must be " '*immediately and irreparably affected* by approval of a settlement' " (*ibid.* (emphasis in original; citation omitted)) in order "to raise [the] proceeding to the level of a contested settlement" (*id.* at 37a). The Commission analogized this standard to that which "courts have fashioned * * * to determine judicial standing" (*id.* at 36a).[17] The Commission, analyzing the "specific facts" of the case, determined that Arctic was not "particularly 'aggrieved' by the settlement" but could assert only contingent and potential harm (*ibid.*). Accordingly, the Commission postponed an evaluation of petitioner's challenge to the settlement to such time as petitioner could show a more immediate and direct impact. See *id.* at 37a-40a.

To be sure, the court of appeals rejected, in response to the TAPS owners' argument that petitioner lacked standing to challenge the settlement,[18] any suggestion in the Commission's order that Arctic did not allege "a sufficient present injury to satisfy jurisdictional [standing] prerequisites" (Pet. App. 10a n.10). At the same time, however, the court of appeals made clear that it accepted the Commission's view of its own discretion to conclude the proceedings for the reasons articulated by the Commission. See *id.* at 19a.

---

[17] The Commission described that judicial "test" as "whether a party 'has sustained an injury *in fact* to an interest arguably within the zone of interests protected or regulated by the [Interstate Commerce Act]' " (Pet. App. 36a (brackets and emphasis in original; footnote omitted)).

[18] In the court of appeals, the Commission did not assert that Arctic lacked standing to file its challenge. The Commission contended only that Arctic's attenuated interest offered no basis for "upset[ting] a settlement otherwise clearly in the public interest" (FERC Br. 25).

A fair and careful reading of the court of appeals' opinion, in light of the Commission's order, belies any claim that the court decided the case on a ground that the Commission itself had not adopted. On the contrary, the court of appeals fully agreed with the Commission's critical finding that approval of the settlement would not so immediately and irreparably affect Arctic's interests to warrant that its challenge should go forward. The court of appeals also accepted the Commission's ultimate conclusion that terminating the proceedings was appropriate and within the bounds of its discretion under the pertinent statutes and regulations. See Pet. App. 17a-19a; cf. *Penn-Central Merger and N & W Inclusion Cases,* 389 U.S. 486, 526 n.14 (1968).

Petitioner seeks to treat the Commission's ruling as an inflexible jurisdictional holding that cannot be characterized as an exercise of discretion. That treatment, however, is unjustified. Whether phrased in terms of "aggrievement," "ripeness," or "prematurity," the focus of the Commission's decision, far from being a rigid jurisdictional ruling, reflects a balancing of competing interests in order to determine the proper course under the circumstances. In affirming this determination, the court of appeals concluded that the Commission had acted "appropriate[ly] * * * under the specific circumstances at hand" (Pet. App. 17a). Contrary to petitioner's claim, the court of appeals did not "invent[] a theory that [the Commission] has never suggested or adopted" (Pet. 14).

2. Petitioner also contends (Pet. 20-23) that the court of appeals failed to treat the case as a complaint under Section 13(1) of the Interstate Commerce Act, 49 U.S.C. 13(1), and thus erred in not requiring the Commission to resolve Arctic's challenge to the TAPS rates. As the court of appeals made clear (Pet. App. 12a n.13), however, the

filing of a complaint under Section 13(1) had not prompted the Commission's proceeding.[19] Rather, the Commission initiated the proceedings on its own motion under Section 15(7) in response to the TAPS owners' filing of new rates. The court of appeals adhered (Pet. App. 12a-13a) to this Court's decisions holding that an agency's discretion under Section 15 proceedings is broad and, in some instances, unreviewable. See, *e.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). The court thus correctly concluded that "decisions under the [Interstate Commerce Act] not to pursue an investigation once begun lie squarely within the agency's discretion, even if the initial investigation reveals that some rates, though not all, are illegal" (Pet. App. 13a, citing *United States* v. *Louisiana*, 290 U.S. 70 (1933)).

Petitioner attempts to blunt the force of this straightforward reasoning by erroneously assuming that the case, however initiated, must be treated as having arisen under Section 13(1). The fact remains that the case began as an investigation under Section 15(7), not as a formal complaint under Section 13(1), and that the court of appeals' analysis of the applicable scope of the Commission's discretion in this matter followed settled law. Moreover, petitioner's unfounded assumption would lead to the unprecedented conclusion that the remedies of Section 13(1) automatically apply whenever a private party files a protest against a rate subject to the Commission's jurisdiction under Section 15(7). In *Southern Ry.* v. *Seaboard Allied*

---

[19] The court of appeals stated that petitioner "has advanced no reason to persuade us that section 13 was ever involved in this case" (Pet. App. 12a n.13).

Milling Corp., 442 U.S. at 463 (emphases in original),[20] however, this Court has already made clear that remedies under Sections 15(7) and 13(1) are independent of each other:

> [I]t is * * * clear that [the Section 13(1)] remedy is independent of § 15(8)(a) proceedings. First, the language of § 15(8)(a) suggests no linkage to § 13(1) * * *. Second, § 13(1) has been an independent and self-contained procedure since the Act was first passed in 1887. When § 15(8)(a) was added some 23 years later, there was no indication that it was intended as an *amendment* to § 13(1), rather than as a limited pre-effective and Commission-initiated *alternative* to the posteffective and shipper-initiated procedures in § 13(1).

Indeed, acceptance of petitioner's ill-founded premise would require this Court to repudiate the line of decisions holding that an agency exercises considerable discretion under Section 15(7). See, *e.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*, *supra*; *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963).[21] Petitioner offers no sound basis for the Court to take this step.

---

[20] Section 15(8)(a), currently codified at 49 U.S.C. 10707, was enacted by Congress as part of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 203(e), 90 Stat. 36, to replace Section 15(7) as it applied to railroads. Section 15(8)(a) is the same as Section 15(7) in all respects material to the present discussion.

[21] Petitioner errs in relying (Pet. 24) on *City of Chicago* v. *United States*, 396 U.S. 162 (1969), and *Minneapolis Gas Co.* v. *FPC*, 294 F.2d 212 (D.C. Cir. 1961). Petitioner claims that those decisions show that the duration and course of the proceedings themselves obligated the Commission to adjudicate the lawfulness of the TAPS rates. In *City of Chicago*, however, the ICC's decision resulted in the immediate grant of the relief requested. Here, the initial rates that caused the Commission's investigation under Section 15 have been replaced

3. Petitioner further argues (Pet. 17-20) that the Due Process Clause prohibits "dismiss[ing] [petitioner,] an aggrieved party[,] from a proceeding that directly affects its interests, without ruling on the merits of its claim" (Pet. 18). This claim is both overstated and erroneous. To be sure, the court of appeals did hold that petitioner had standing to maintain this action. See Pet. App. 10a n.10. Petitioner, however, conveniently elevates this ruling into a constitutional prohibition against the Commission's chosen method of resolving the case. This sleight of hand cannot succeed because, as this Court has consistently recognized, "[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances." *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982).

The court of appeals noted that "Arctic's interest in TAPS tariffs stems from its ongoing negotiation of exploration leases and the level of bonus and royalty payments it may achieve, sources of compensation that are potentially affected by transportation costs in bringing oil via TAPS to market" (Pet. App. 3a; see *id.* at 10a n.10). The court, however, weighed this interest against other crucial facts in approving the Commission's decision to require Arctic to initiate a further complaint or protest if it wishes to challenge the TAPS rates filed under the settlement. First, the court found that the settlement's impact on Arctic, "though assuredly real," is also "indirect" (*id.* at 18a n.20). This distinction is not semantic. Arctic's current interest in the TAPS rates has not led it to file a complaint or protest against the rates promulgated under the

---

by the TAPS settlement. Similarly, in *Minneapolis Gas Co.*, the Commission's refusal to act effectively left in place rates deemed to have been just and reasonable. In the instant case, however, the Commission made clear that its settlement approval does not establish that the rates are just and reasonable. See Pet. App. 14a n.16.

settlement. And, as all parties agree, Arctic cannot expect to ship oil, if at all, before the mid-1990s.

Second, the court of appeals recognized that, given Arctic's current attenuated as compared to more direct future interest in TAPS rates, the Commission quite properly could provide Arctic "with a meaningful remedy contemplated by the statute" (Pet. App. 18a n.21), while choosing to approve the settlement in the public interest and deferring petitioner's challenge to a future proceeding. This procedural solution to a complicated administrative problem, namely, balancing the immediately pressing interests of other diverse parties involved in complex and protracted litigation while preserving Arctic's right to challenge future TAPS rates when its interest becomes more concrete, comports with the Due Process Clause by ensuring petitioner "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)).

4. Finally, petitioner contends (Pet. 24-28) that the Commission's action in severing petitioner and approving as uncontested the settlement agreement violated the Commission's own rules. The court of appeals, following its earlier decision in *United*, 732 F.2d at 209, construed the Commission's rules as permitting the severance of a non-settling party in order to enable the settlement to proceed on an uncontested basis (Pet. App. 11a). And, as in *United*, petitioner, as the non-settling party, "was afforded a further procedural remedy (consistent with the statute and the Commission's rules) to challenge the rates it was being charged" (*id.* at. 8a).

Nevertheless, petitioner cites its "aggrieved" status as requiring the Commission to treat the settlement as contested and thus afford Arctic an immediate hearing. Petitioner's attempt to twist the meaning of the Commission's

rules must fail because, at bottom, petitioner seeks to make mandatory what the rules leave discretionary. Rule 602(h)(1)(i), 18 C.F.R. 385.602(h)(1)(i), for example, states that "the Commission may decide the merits of the contested settlement issues"; Rule 602(h)(1)(ii)(B), 18 C.F.R. 385.602(h)(1)(ii)(B), similarly provides that when confronted with a contesting party to a settlement, the Commission may take such "action which the Commission determines to be appropriate." As the court of appeals correctly observed, "[t]he breadth of discretion trumpeted by that provision is manifest" (Pet. App. 11a).[22] In the circumstances presented, the Commission's action fell well within its settled discretionary practice under its rules.

---

[22] Hence, petitioner errs in relying (Pet. 28-30) on decisions such as *New Orleans Public Service* v. *FERC*, 659 F.2d 509 (5th Cir. 1981), as creating a conflict with the court of appeals' decision. Because the Commission exercises considerable discretion in its approval of settlement agreements, decisions such as *New Orleans Public Service*, which hold that the Commission can treat its approval of a contested settlement as a resolution of the merits, are entirely consistent with the decision here.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

CATHERINE C. COOK
General Counsel
JEROME M. FEIT
Solicitor
HANFORD O'HARA
Attorney
Federal Energy Regulatory Commission

JULY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60548